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NO. 01-187

IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE DANIELS,
Petitioner,

v.

CITY OF ARLINGTON, TEXAS AND THERON BOWMAN, CHIEF OF POLICE, ARLINGTON, TEXAS,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

# REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

GEORGE DANIELS respectfully submits this Reply to the Brief in Opposition to his Petition for Writ of Certiorari, filed by Respondents City of Arlington, Texas and Theron Bowman.

### I. CONTRARY TO RESPONDENTS' ARGUMENT, THE ISSUES RAISED IN THIS PETITION ARE NOT CONTROLLED BY *KELLEY V. JOHNSON* OR *GOLDMAN V. WEINBERGER*.

Respondents cite to *Kelley v. Johnson*, 425 U.S. 238 (1976), as authority for the actions taken by the Arlington Chief of Police. However, even a cursory reading of *Kelley* shows there is nothing similar about that case other than the fact that both cases concerned the appearance of police officers. If this were a case in which *appearance* were the issue, *Kelley* would be instructive. However, it is not.

*Kelley* involved a regulation about hair length on uniformed police patrolmen. Importantly, the plaintiff in that case was not claiming that wearing his hair long was a fundamental tenet of his religious faith or was symbolic speech of any kind; instead, he was merely claiming that his "liberty interest" under the 14th Amendment was impacted by the regulation.[1] Even more significantly, the

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[1] The Supreme Court in *Kelley* cast doubt on whether such a "liberty interest" even exists under the Constitution: "But whether the

(continued...)

defendant in *Kelley* made a convincing case that long hair could be a detriment to the efficient functioning of the department, that it could endanger the officer wearing it, and that it could thus endanger the mission of the department as well as other officers working with that officer.

Respondent accuses Petitioner of arguing the straw-man position advanced by the Court of Appeals in *Kelley*, to wit, that the state must come forward with convincing reasons for *any* regulation before it will pass Constitutional muster. *Kelley*, 425 U.S. at 247. This is not the case. Rather, Petitioner cites to the language of this Court in *Kelley*, asking that the City be required to come forward with some proof, however slight, that its regulation is designed to advance an interest the City is charged with protecting:

> Thus the question is not, as the Court of Appeals conceived it to be, whether the State can "establish" a "genuine public need" for the specific regulation. It is whether respondent can demonstrate that there is no rational connection between the regulation, based as it is on the county's method of organizing its police force, *and the promotion of safety of persons and property.*

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[1](...continued)
citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance is a question on which this Court's cases offer little, if any, guidance." *Kelley*, 425 U.S. at 244. It is doubtful whether the City could make a convincing argument that Sergeant Daniels' freedoms of speech and religious expression enjoy no greater status than Officer Kelley's proclaimed "liberty" interest.

*Id.* (emphasis added). This point was emphasized by Justice Powell in concurrence: "When the State has an interest in regulating one's personal appearance, as it certainly does in this case, *there must be a weighing of the degree of infringement of the individual's liberty interest against the need for the regulation.*" *Id.* at 249 (emphasis added).[2]

This is the argument made all along by Petitioner in this case: that there is no evidence in the case showing a rational basis between the "no pins" regulation and "the promotion of safety of persons and property." The City has so far failed to produce evidence supporting even a rational basis for the regulation.

This Court gave instruction in *Kelley* regarding what evidence is required from both parties when a government regulation is at issue. Petitioner has faithfully followed the Court's lead in bringing and arguing the case. The Respondent, on the other hand, has not fulfilled its burden.

Finally, the Suffolk County's hair-length regulation was uniformly applied to everyone. There was no evidence that other officers were allowed to wear long hair while Officer Kelley was denied the same right. Here, Sergeant Daniels has convincing proof – ready for the jury – that Arlington police officers were allowed, even *encouraged,* by the Chief to wear other ornamentation but when it came to the Christian cross, the ordinance was suddenly sacrosanct and unbending. *Kelley* is off-point, and that is the only reason Petitioner did not address that case in his Petition.

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[2] Even more pointed were the remarks of the dissent in *Kelley*, 425 U.S. at 254, n.5.

Even further afield, Respondents cite to *Goldman v. Weinberger*, 475 U.S. 503 (1986), a case that did not even involve the civilian police, but rather the altogether different forum of the United States military. Significantly, the Supreme Court in *Kelley* dismissed the argument that civilian police are "paramilitary" in nature, calling it "correct" that civilian police are *not* afforded the same judicial deference accorded the military in matters of discipline and dress. *Kelley*, 425 U.S. at 246. Indeed, there are no cases from this Court analogizing regulations of civilian government employers to those used by the military, especially in matters of Constitutional jurisprudence. Again, Petitioner did not waste time addressing *Goldman* in his Petition solely because the case is factually and legally off-point.

## II. RESPONDENTS' "PROOF" OF HARM IS UNSUPPORTED BY THE EVIDENCE

To their credit, Respondents do not expressly invoke the "slippery slope" argument in their brief. However, that argument is just under the surface of all of the City's claims of "harm."

On page 2 of their Brief, Respondents say: "the City did come forward with evidence of its legitimate governmental interest in regulating the appearance of its police uniform." For this, the City cites to Record at 214-15 and 296, which is nothing more than testimony and statements of the Chief that he wanted his officers to remain "neutral" (whatever that is) in their appearance. However, this is not evidence of a legitimate governmental *interest*; it is only another way of saying the Chief wanted to "preserve" what were in his mind "desirable conditions." To *properly* address the matter at issue, we must proceed at least one step further and ask: "Why does the department need neutrality and how does a cross detract

from or impugn that need?" In support, the City alleges (*sub voce*) that a cross on the uniform would demonstrate actual "bias" in the wearer. Clearly and admittedly there is no *evidence* in the record that anyone would perceive a police officer wearing a cross as "non-neutral" or "biased" or "undisciplined" or any of the other parade of horribles the City envisions and asks this Court to accept. Where is the City's evidence of "harm"?

The legal system is based on evidence, not conjecture and supposition. Summary judgment may only be based on substantial evidence. The City cannot tell the Court that it has "come forward with evidence of its legitimate governmental interest" and then provide the unbuoyed opinions and personal desires of its Chief as the only "evidence" to support that claim. Indeed, these statements are not evidence in any sense of the word. Surely, the City must at least prove that someone, even the Chief for that matter, actually felt that Sergeant Daniels *was* "biased" or "undisciplined" by the fact that he wore a cross on his shirt, and that the City fired him based on potential disruption to the City's routine. The City has not done so. Even Chief Kunkle *himself* testified that he would *not* perceive an officer wearing a cross as "biased."[3]

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[3] Kunkle Deposition, pp. 218, 221-22 (the actual record cite for this statement is no longer available, as the record has been returned to the District Court).

The City will no doubt say: even though Chief Kunkle *himself* did not feel that an officer wearing a cross would affect the officer's ability to be fair and impartial nor would his personal opinion of the officer suffer, it *might* affect the perception of fairness in some unknown, unidentified citizen. But, again, on the record now before the Court, that remains only Chief Kunkle's unsubstantiated, personal opinion:

(continued...)

In support of this point, the Court is referred to the recent case *Locurto v. Safir*, 2001 WL 987141 (2nd Cir. 2001). In that case, a policeman and two firefighters were fired for participating in a parade, allegedly while riding on a "racist float." The officers sued under section 1983, and the District Court denied dismissal motions filed by the City claiming qualified immunity. In affirming the ruling below, the Second Circuit set forth certain legal principles which are applicable to the summary judgment issues in this case. Relying in part on this Court's opinion in *Crawford-El v. Britton*, 523 U.S. 574 (1998), the Second Circuit, applying the balancing test set forth in *Pickering v. Bd. of Educ. of Will Township*, 391 U.S. 563 (1968), held:

> [A] government employer may fire an employee for speaking on a matter of public concern if "(1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for

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[3](...continued)

> Q: ...Now, the question becomes, your decision not to let him wear the cross was not based on whether that would impact his ability to be fair, neutral, or objective. It was based on your opinion that it might affect his perception in somebody's mind of being fair, neutral, or objective, right?
>
> A: Correct, but it was not – the decision with George Daniels was not specifically directed at the cross.

*Id.* This is strong evidence that there is no evidence supporting the City's position on this point.

its speech." *Jeffries v. Harleston*, 52 F.3d 9, 13 (2nd Cir. 1995). As this last element suggests, "even if the *Pickering* balance is resolved in the employer's favor, the employee may still demonstrate liability by proving that the employer disciplined the employee in retaliation for the speech, rather than out of fear of disruption." *Lewis [v. Cowen]*, 165 F.3d [154] at 163 [(2nd Cir. 1999)]; accord *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998) (noting "retaliation for the exercise of free speech" as an example of a claim for which an official's motive is a necessary element); *Sheppard v. Beerman*, 94 F.3d 823, 827 (2nd Cir. 1996).

Consequently, although the *Pickering* test presents a question of law, resolution of a First Amendment retaliation claim on a motion for summary judgment may not be possible if the plaintiff introduces sufficient evidence to create a genuine issue of material fact on the question of defendant's improper intent, which is a question of fact. *See Sheppard*, 94 F.3d at 278 (plaintiff may avoid summary judgment on First Amendment retaliation claim based on qualified immunity defense if he can show "particularized evidence of direct or circumstantial facts supporting his claim of unconstitutional motive).

Here, Petitioner has shown more than sufficient evidence that his firing was based on improper retaliation for his speech, and Chief Kunkle's motivation is thus a question of fact, even on the issue of qualified immunity. Summary judgment is not available to a defendant in these situations.

Since the City has no actual evidence that the cross pin would cause "bias" or would affect "discipline", the City leaves hanging in

the air the possibility that the cross may only be the first step, that eventually we will see smiley faces on uniforms, then swastikas. This is the *actual,* but irrational, fear the City expresses when it says the "no pins" regulation is meant to "maintain the uniform as a symbol of neutral government authority, free from expressions of personal bias." That fear, especially in its presently-unsubstantiated form, cannot be the basis for an intelligent discussion of the issues in this case, and certainly will not fulfill the City's high burden on summary judgment.

## CONCLUSION

The City's arguments make no sense. It is nonsensical to contend that one police officer wearing a tiny, 1/4-inch gold cross on his uniform shirt would so detract from the mission or goals of the police department as to threaten "the promotion of safety of persons and property." It makes no sense that this cross pin would demonstrate to any reasonable, thinking citizen that the Arlington police department was "biased" against him or her in some unspecified, unarticulated way. It is unreasonable to postulate that this cross pin would turn a 14-year, highly-decorated police sergeant into a biased, undisciplined, unprofessional problem employee for his superiors to contend with. It makes no sense that this cross pin would actually cause reasonable members of the public to disrespect the officer wearing it or the police force in general. Yet, these are the City's arguments in their unvarnished state. All the City offers to support its case is conjecture, the ineffectual "slippery slope" argument, and the Chief's personal, unsubstantiated opinion that the wearing of a cross would or might detract from his perceived need to have a uniform "free from personal bias." Petitioner submits that ersatz "proof" of this nature

is insufficient as a matter of law to permit the termination of the employment of a dedicated public servant.

Petitioners respectfully submit that the Petition should be granted to address the judgments of the lower courts, or in the alternative, that the decision of the Fifth Circuit may be summarily reversed.

Respectfully submitted,

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